(8)

No. 94-367

In The

Supreme Court of the United States

October Term, 1994

GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Is an attorney engaged solely to prosecute litigation against a consumer a "debt collector" within the meaning of the Fair Debt Collection Practices Act (15 U.S.C. § 1692a(6))?

TABLE OF CONTENTS

TABLE OF CITATIONS

INTEREST OF THE *AMICUS CURIAE*

Counsel represents Sherry Ann Edwards, a consumer who is currently involved in litigation involving the attempted foreclosure of her home by a law firm whose primary practice involves non-judicial foreclosures through the Public Trustee of the State of Colorado. Under Colorado law, a mortgagor is guaranteed the right to "cure" the default prior to foreclosure sale by paying the arrearages and expenses and thereby bringing the loan current. This right is protected by the filing of a Notice of Intent to Cure with the Public Trustee. The Public Trustee, in turn, requests that the foreclosing party prepare and file a statement as to the amount necessary to cure the default.

The figure provided by the foreclosing party is binding upon the Public Trustee, who serves in a ministerial capacity. Colorado does provide for limited court supervision of the foreclosure process through a hearing procedure set forth in the Colorado Rules of Civil Procedure ("Colo.R.Civ.P."), but it is limited to determining the existence of a default:

> The scope of the inquiry at such hearing shall not extend beyond the existence of the default or other circumstances authorizing, under the terms of the instruments described in the motion, exercise of a power of sale contained therein. . . .

Colo.R.Civ.P. 120(d). Counsel has, in a prior case, attempted to challenge the cure figure provided by a foreclosing party against a different consumer during the Colo.R.Civ.P. 120 procedure. The trial court in that case refused to consider such an argument, holding that it was

bound by the limitations as to the scope of inquiry set forth in Colo.R.Civ.P. 120(d). Because such rulings of the trial court are not reviewable on appeal under Colo.R.Civ.P. 120(d)[1] no higher court has reviewed or rendered a reported decision on this issue.

Because of the limited review afforded mortgagors, they are at great risk of losing their homes if they cannot "cure" the default. In Ms. Edwards' circumstances, the amounts contained in the cure letter, which were prepared and signed by the attorneys for the mortgagee, included amounts which she believes are erroneous and excessive. The attorneys were claiming, amongst other charges, that her monthly payments were over $200.00 when the promissory note required payments of only $133.10. They were also seeking attorney's fees, which were arguably not allowable under the terms of the Deed of Trust, which was the document containing the power of sale. As a result, the difference between what the Public Trustee was requiring to cure the default and what Ms. Edwards believed she legally owed was in the thousands of dollars. These were funds which she does not have.

Ms. Edwards' counsel initially attempted to informally resolve the dispute with counsel for the mortgagee, but they continued to demand all amounts claimed in the letter to the Public Trustee. Therefore, in order to protect herself from losing her property, Ms. Edwards was forced to commence litigation to enjoin the sale until a trial

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[1] "Neither the granting nor denial of a motion under this Rule shall constitute an appealable order or judgment."

could be held on the disputed cure amount. She also alleged violations of the Fair Debt Collection Practices Act ("FDCPA") by the attorneys based upon their actions.

Ms. Edwards, unlike most debtors who are in default, was in a position to obtain injunctive relief because she could use the equity in her home as a bond required under Colorado law. Colo.R.Civ.P. 65 & 121, Section 1-23(3). Ordinarily, debtors who are being foreclosed have no or insufficient equity in their homes and have no other assets to post a bond to stop the foreclosure. Once the property goes to sale, the right to cure is lost, and the debtors will almost certainly lose their homes and be evicted therefrom.

The Question Presented for Review to this Court is crucial to the protection of Ms. Edwards' rights in her case. The necessity of filing for injunctive relief has caused her to incur thousands of dollars in legal fees to stop the foreclosure. Under Colorado law, she has no mechanism to recover these fees, either from the mortgagee or its counsel. The FDCPA provides the sole remedy to make her whole if she is successful in prevailing on the merits of her claim that the amount necessary to cure the default is less than that claimed by the mortgagee's counsel. Should this Court reject the majority of decisions out of lower courts, which hold that attorneys are subject to the FDCPA, even in the performance of traditional "legal" activities, Ms. Edwards will "win the battle but lose the war"; it will cost her more to protect her legal rights than it would to pay an amount which she is not legally obligated to pay.

SUMMARY OF ARGUMENT

The exemption provided to attorneys from being subject to the requirements of the FDCPA was lifted in 1986. In so doing, Congress placed attorneys on equal footing with traditional collection agencies in terms of control over what they can and cannot do in their attempts to aid creditors in the collection of obligations owed by consumers. The language which remained after the lifting of the exemption was clear and unambiguous; there was no language which indicated that attorneys were to be treated any differently than any "debt collector." Nor has Congress ever made a distinction between traditional "debt collection" and traditional "legal" activities in any portion of the FDCPA.

ARGUMENT

When Congress removed the attorney exemption from the FDCPA in 1986, it simply repealed 15 U.S.C. §1692a(6)(F), which provided:

> The term [debt collector] does not include any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client.

By doing so, Congress took the clear and unambiguous position that attorneys-at-law were thereafter subject to *all* provisions of the FDCPA. It could have, but did not, limit those activities to which attorneys would be subject when the exemption was lifted.

The FDCPA has restrictions which govern traditional "debt collection" activities, as well as traditional "legal"

activities. The most obvious one is the venue protections afforded by 15 U.S.C. §1692i. This statute specifically prohibits the filing of "legal actions" in distant forums because such filings substantially increase the risk that consumers will be subject to default judgments. If this Court were to answer the Question Presented for Review in the negative, attorneys collecting debts against consumers would once again be allowed to return to their prior activities of filing actions in distant forums which may be permissible under state law but prohibited under the FDCPA.[2]

The problem of distant forum abuse was addressed by the Colorado Supreme Court in *Shapiro and Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992). Under Colorado law, a court proceeding to authorize a foreclosure sale could be brought in any county in the state, regardless of the situs of the property. Colo.R.Civ.P. 120(f) (as it existed prior to the 1991 amendment changing the venue provision to

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[2] In fact, this was the primary reason for the repeal of the attorney exemption. The American Collectors Association presented the following attorney's advertisement in its testimony to the Consumer Affairs Subcommittee of the House of Representatives:

> Collection agencies are governed by the Fair Debt Collection Practices Act which requires that suit be filed in the county of the debtor's residence. *As an attorney, I am exempt from this Act, . . .* We do not have to refer your accounts to other counties which usually involves . . . further delays and expenses, travel (of attorney and witnesses) to other counties in the event of trial or other court hearings. (Emphasis added).

H.R. Rep. No. 99-405, 99th Cong. 2nd Sess., *reprinted in* 1986 U.S. Code Cong. & Ad. News 1766.

comply with the FDCPA). A class action had been commenced against three law firms whose activities primarily involved large volumes of foreclosures, because it was their common practice to commence such proceedings in the county where their offices were, regardless of the situs of the property. The supreme court was called upon to determine whether the Colo.R.Civ.P. 120 procedure was subject to the venue provision of the FDCPA and whether the attorneys were "debt collectors." The trial court had answered in the negative on both issues. The Colorado Court of Appeals, in *Zartman v. Shapiro and Meinhold*, 811 P.2d 409 (Colo.App. 1990), reversed the trial court on both issues.

The Colorado Supreme Court chose not to review the issue of the applicability of the FDCPA to Colo.R.Civ.P. 120 proceedings but did grant certiorari to review the holding that the attorneys, who only performed traditional "legal" activities, were subject to the FDCPA. This is the same issue before this Court, and the lawyer-defendants in that case made the identical arguments raised here. They attempted to turn legislative construction on its head by claiming that the legislative history and informal position taken by the Federal Trade Commission staff created an ambiguity in the legislation which was otherwise absent. The Colorado Supreme Court saw through this fallacious reasoning and held that the statute makes no distinction which would exempt lawyers performing traditional legal activities from the FDCPA.

In reaching its decision, the court first applied the proper rules of statutory construction to the removal of the attorney exemption. In a slightly different twist from

that presented in the present case, the attorneys first argued that, because their principal business was the enforcement of security interests through foreclosure, they were only subject to the FDCPA restriction found in 15 U.S.C. §1692f(6), which provides:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> Taking or threatening to take any nonjudicial action to effect dispossession . . . of property. . . .

The attorneys claimed that, when read in conjunction with language contained in 15 U.S.C. §1692a(6),[3] the venue provision of 15 U.S.C. §1692i did not apply to them.

The Colorado Supreme Court concluded that the FDCPA and the lifting of the attorney exemption resulted in a clear and unambiguous law which was not subject to interpretation:

> A plain reading of section 1692a(6) indicates that any person who qualifies under the first sentence in the definition is a debt collector for purposes of the FDCPA. . . . If Congress had intended to exempt one whose principal business is the enforcement of security interests, it

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[3] The language cited by the attorneys is as follows: "For the purpose of section 808(6) [15 U.S.C. § 1692f(6)], such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests."

> would have provided an exemption in plain language.

Shapiro and Meinhold, supra at 124. Likewise, had Congress intended that attorneys only be subject to the FDCPA if they were performing traditional "debt collection" activities, it would have provided plain language to that effect. The absence of any such language distinguishing the types of collection activities conducted by attorneys which would be subject to the FDCPA mandates a finding by this Court that attorneys are subject to the Act regardless of the nature of their activities.

Even if the lifting of the attorney exemption created an ambiguity, rules of statutory construction require that the FDCPA be liberally construed to carry out its remedial purpose. The Colorado Supreme Court, in addition to finding the FDCPA to be clear and unambiguous, proceeded to address and reject some of the concerns which are now being raised by the attorneys in the present case:

> If the definition of debt collectors is construed liberally, with the remedial purpose of the statute in mind, the attorneys are not exempt merely because their collection activities are primarily limited to foreclosures. The section 1692a(6) definition of the term debt collector includes one who "directly or indirectly" engages in debt collection activities on behalf of others.

Shapiro and Meinhold, supra at 124. The Colorado Supreme Court followed the reasoning and holding of *Crossley v. Lieberman*, 868 F.2d 566 (3rd Cir. 1989), that attorneys are subject to the FDCPA, even where their activities are

traditionally "legal" in nature. *See also Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992); *Strange v. Wexler*, 796 F.Supp. 1117 (N.D.Ill. 1992); *Kolker v. Sanchez*, CCH No. 46,774 (D.N.M. 1991); *Littles v. Lieberman*, 90 B.R. 700 (E.D. Pa. 1988); *Stewart v. Salzman*, CCH No. 44,333 (D. Conn. 1987).

Although the argument that traditional "legal" activities are not subject to the FDCPA seems attractive at first, abuses involving these activities are far more dangerous to the rights of consumers. The purpose of the FDCPA cannot be disputed; it was intended to insure that debt collectors do not use unfair tactics in the collection of debts. Because consumers are generally less sophisticated, they are more susceptible to forfeiting legal rights when abuse is involved. When the abuse occurs during a traditional "legal" activity, the consumer is at the greatest risk of loss. *e.g., Strange, supra* (where a consumer may have default judgment entered for attorney's fees where they are pled but no legal basis exists); *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D. Ala. E.D. 1987) (where a consumer is likely to have judgment entered against him where a suit is filed after the statute of limitations has run on the claim); *Shapiro & Meinhold, supra* at 125 (where a consumer is likely to default in defending against a foreclosure where the proceeding is commenced in a distant forum).

It is important that the lifting of the attorney exemption guarantee consumers all of the legal protections provided by the FDCPA regardless of whether the creditor is represented by a collection agency or an attorney. The ramifications of abusive activities are identical, regardless of who is attempting to collect the debt. When Congress decided that the FDCPA was only applicable to persons

collecting the debt of another, there was good reason for such a distinction; creditors generally try to preserve their good name and reputation with their customers and are therefore less likely to undertake abusive tactics. Attorneys, on the other hand, have no such reputation to protect and are therefore just as likely as a collection agency to undertake those activities which are prohibited by the FDCPA and which are likely to result in the recovery of their client's money. The plain and unambiguous language of the FDCPA should be preserved. This Court should not undertake judicial legislation and leave the task to Congress should it subsequently choose to limit the extent of the lifting of the attorney exemption to traditional "debt collection" activities.

CONCLUSION

The majority of courts called upon to decide the extent to which attorneys are subject to the FDCPA have reached the conclusion that Congress made no distinction between traditional "debt collection" and "legal" activities when the attorney exemption was repealed. Although regulation of the practice of law is generally reserved to the courts, there are numerous examples of restrictions placed on attorneys conducting traditional "legal" activities by legislation. If this Court follows the basic rules of statutory construction, it can reach no other conclusion but that attorneys who exclusively prosecute litigation against consumers must live by the same rules imposed by the FDCPA as anyone collecting the debt of

another, regardless of whether they do so under the title of "collection agency" or "attorney-at-law."

Respectfully submitted,

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